No. 27618 - State of West Virginia v. Lorenza Damon Valentine

FILED
January 5, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
January 5, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., concurring:

The defendant in June of 1998 pled guilty to a charge of killing someone -- even though the defendant did not actually shoot the victim. The judge did not give the proper cautionary warning -- but it is clear that the defendant knew that he would not be allowed to withdraw the plea, once he had entered it. Three months later, in September of 1998, well before the sentencing, the defendant wanted to change his mind and asked the court to let him withdraw his plea. The trial judge properly exercised his discretion and denied this request. (The judge also could have granted the request -- I probably would have allowed the withdrawal.)

Because of what I see happening on a too-regular basis on this Court, I write separately to emphasize that there is a substantial body of case law to the effect that finding harmless error is not automatic in these situations. *See, e.g.*, *United States v. Ferrara*, 954 F.2d 103 (2d Cir. 1992) (from the record the court concluded it was apparent that the defendant was confused and the omission of the warning that his plea could not be withdrawn added to the confusion; the court found reversible error); *United States v. Iaquinta*, 719 F.2d 83, 85 (4th Cir. 1983) (the court found that merely informing the defendant that the court is not bound by a recommendation or request is not sufficient warning when the district court never attempted to ascertain by any means the defendant understood he had no right to withdraw his plea); *United States v. DeBusk*, 976 F.2d 300, 306-07 (6th Cir. 1992) (the record evidenced considerable confusion misleading the defendant on the consequences of the plea, strict

adherence to the rule could have cured confusion, therefore failure to give warning the plea could not be withdrawn was not harmless); *United States v. Graibe*, 946 F.2d 1428, 1433 (9th Cir. 1991) (the court must look to the record to determine what defendant actually knew at time of plea hearing, and omission may be harmless if record shows that defendant knew he would be bound by his plea regardless of length of sentence imposed); *United States v. Theron*, 849 F.2d 477 (10th Cir. 1988) (not harmless error because district court never attempted to ascertain by any means whether the defendants understood that they wee without the right to withdraw plea).

These cases were commendably brought to this Court's attention by counsel for the state. As these cases show, the law is clear that whenever there are reasonable grounds to believe that a defendant didn't fully understand when he pled guilty that he could not withdraw the plea, he must be allowed to do so.